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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 491

P. & D. MANUFACTURING CO., INC.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No.

P. & D. MANUFACTURING CO., INC.,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Your petitioner, P. & D. Manufacturing Co., Inc., prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered in the above entitled case on April 30, 1957.

OPINIONS BELOW.

The Hearing Examiner's Initial Decision appears in the separately printed Appendix at pages 58-70. The opinion of the Commission appears in the separately printed Appendix at pages 74-93. The opinion of the Court of Appeals is reported at 245 F. 2d 281 (Appendix, *infra*, p. 1A).

JURISDICTION.

The judgment of the Court of Appeals was entered April 30, 1957 (Appendix, *infra*, p. 1A). A timely petition for rehearing was denied August 21, 1957 (Appendix, *infra*, p. 4A). On August 28, 1957 the Court of Appeals entered a Final Decree Affirming Order to Cease and Desist (Appendix, *infra*, p. 5A). The Court of Appeals on August 28, 1957 entered an order staying the enforcement of the decree for a period of 30 days to permit petitioner to apply to the Supreme Court for a writ of certiorari, (Appendix, *infra*, p. 7A).

The Court's jurisdiction is invoked under Title 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED.

1. (a) Whether the Seventh Circuit Court of Appeals' denial of petitioner's motion, requesting said Court of Appeals to modify the Commission's cease and desist order herein in the same manner as it had done in the case of *C. E. Niehoff & Co.* v. *Federal Trade Commission*, 241 F. 2d 37 (decided January 9, 1957), constitutes error or produces an intra-Circuit conflict of decisions which requires correction by the Supreme Court?

(b) Whether the Court of Appeals unreasonably failed to stay forthwith execution of a cease and desist order against petitioner until petitioner's competitors, who are using similar forms of discount structures, can be subjected to similar judgments and orders; whether such failure by the Court of Appeals is inequitable, unjust and unfair when petitioner is subjected to the judgment and decree of the Court while its competitors may still continue their existing discount structures, thereby inevitably causing petitioner to suffer loss of business and serious economic damage; and whether under such circumstances the Court,

should exercise its original equitable jurisdiction to protect the rights of petitioner.

2. Whether a published quantity discount, available in fact to all, may be found to be a violation of Subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, Title 15, Section 13, U.S.C. (Appendix, *infra*, p. 8A) without proof of injury to competition.

STATUTE INVOLVED.

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by Section 1 of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. §13(a) (Appendix, *infra*, p. 8A).

STATEMENT.

The petitioner grants or allows a monthly volume rebate or discount on its Ignition Line products as follows:

Net Purchases During Each Month	Monthly Rebate
$100 to $149	5%
$150 to $199	7%
$200 to $299	10%
$300 to $399	13%
$400 and over	15%,

and on its Fuel Pump Line products as follows:

Net Purchases During Each Month	Monthly Rebate
$0 to $199	10%
$200 and over	15%.

The Complaint issued by the Commission charges the petitioner with a violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, by selling its products to some purchasers at higher prices than to others, by the allowing or granting of a monthly volume rebate or discount.

No evidence was introduced of any competitive injury being sustained by reason of the pricing practices of petitioner. The only evidence in the record concerning the question of injury is that of one witness who testified that he was not and would not be injured if someone in his area received a larger discount than he did.

The Court of Appeals' decision in effect held that a monthly volume rebate or discount was illegal *per se*, sufficient in law to sustain a cease and desist order in the fact of direct evidence that such price differences are not injurious.

In another Federal Trade Commission case decided by the 7th Circuit Court of Appeals, wherein a similar charge involving pricing structure was involved, *C. E. Niehoff & Co.* v. *Federal Trade Commission*, 241 F. 2d 37 (Appendix, *infra*, p. 10A) the court struck the requirement from the cease and desist Order therein that it go into effect "forthwith," while in the instant case the same Court of Appeals affirmed the cease and desist Order which directed that the Order go into effect "forthwith".

REASONS FOR GRANTING THE WRIT.

The Supreme Court has granted petitions for writs of certiorari limited to the first issue raised herein in the cases of *Moog Industries, Inc., Petitioner*, v. *Federal Trade Commission, Respondent*, Supreme Court, October 1957 Term, No. 77; and in *Federal Trade Commission, Petitioner*, v. *C. E. Niehoff & Co., Respondent*, Supreme Court, October 1957 Term, No. 110; and there is pending a petition before the Supreme Court involving the question herein raised in the case of *E. Edelmann & Company, Petitioner*, v. *Federal Trade Commission, Respondent*, October 1957 Term, No. 101.

The *Moog*, *Niehoff* and *Edelmann* cases, *supra*, are in a sense companion cases belonging to a group of cases involving similar complaints against manufacturers in the automotive-replacement-parts industry. (The *Niehoff* company is a direct competitor of petitioner.) The cases were instituted at approximately the same time and progressed at about the same rate.

The ultimate decisions in these cases have great public importance, as they will vitally affect the automotive-replacement-parts industry, one of the major industries of the country.

The only substantive difference in the decisions in these various cases is the point upon which the Supreme Court has granted certiorari in the *Moog* and *Niehoff* cases and may grant certiorari in the *Edelmann* case.

As stated above, Niehoff and petitioner are competitors in the ignition replacement market. Under the Commission's orders petitioner will be unable to compete with not only Niehoff, but with all other companies in the ignition replacement market as well.

Equity demands that respondents in Federal Trade Commission cases be treated equally; otherwise it may place one respondent in a position where it is unable to fairly compete with its competitors. *Indiana Quartered Oak Co.* v. *Federal Trade Commission*, 58 F. 2d 182 (C.C.A. 2, 1932).

It is submitted to be of great public importance to determine what the policy of the Courts should be in situations of the type herein, where forthwith execution of cease and desist orders may spell economic death of a manufacturer to the benefit of the manufacturer's competitors who are indulging in the same practices which the manufacturer is being prohibited from indulging in.

The actual effect of the denial by the 7th Circuit Court of Appeals to hold the cease and desist order in abeyance, to modify it, or remand the proceedings to the Federal Trade Commission, places petitioner herein in an untenable position competitively and in effect denies it equal protection of the laws. Under such conditions, the very purpose of the Robinson-Patman Act, to protect small competitors such as the petitioner, would be defeated.

CONCLUSION.

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD T. HALFPENNY,
111 W. Washington Street,
Chicago 2, Illinois
Attorney for Petitioner.

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 11798 SEPTEMBER, 1956 TERM—APRIL, 1957 SESSION

P. & D. MANUFACTURING CO., INC., *Petitioner,*
v.
FEDERAL TRADE COMMISSION, *Respondent.*

On Petition for Review of a Final Order of the Federal Trade Commission

April 30, 1957

Before DUFFY, *Chief Judge*, and FINNEGAN and SWAIM, *Circuit Judges.*

DUFFY, *Chief Judge.* This is a petition to review and set aside a cease and desist order of the Federal Judge Commission. The complaint charged petitioner with discrimination in price between different purchasers of its automotive products of like grade and quality in violation of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act (15 U.S.C. §13).

At the conclusion of the testimony and evidence which comprised the Commission's case, petitioner moved to dismiss the complaint on the ground that a *prima facie* violation of subsection (a) of section 2 had not been established. This motion was denied. Petitioner did not present any evidence but again moved for dismissal which motion was likewise denied.

The hearing examiner entered an initial decision and made detailed findings of fact. He found that petitioner

sold its products in commerce; that these products were of like grade and quality; that they were sold to petitioner's customers at different prices; that the customers who were accorded the different prices, competed with each other in the resale of such products; that the different prices were discriminatory and had the proscribed adverse effect upon competition. The examiner concluded that petitioner had violated section 2(a) of the amended Clayton Act, and entered a provisional order to cease and desist. Petitioner appealed and the matter came before the Commission for decision. The Commission denied the appeal, and adopted the findings, conclusions and order of the examiner as those of the Commission.

P. & D. Manufacturing Co., Inc., is located in New York. It sells and distributes in commerce, certain automotive products and supplies which it groups into two lines, an ignition line and a fuel-pump line. The record shows that within each classification or line petitioner's products are of one grade and quality.

Petitioner's domestic sales volume in 1950 was approximately $1,685,000, and sales were made to some 700 automotive parts jobbers who petitioner calls distributors. They, in turn, resell these parts to garages, service stations, fleet owners, car dealers and other jobbers. The price paid by these jobber customers was based in the first instance on petitioner's jobber price list which is the base price schedule. Jobbers purchasing ignition products on the basis of the franchise agreement were accorded discounts of 20% and 2% from the jobber base price schedule. Jobbers purchasing ignition products on the basis of rebate agreements were accorded instead of the usual 2%, varying discounts from the jobber base price schedule depending on total volume of monthly purchases. Essentially the same type of pricing was used for sales in the fuel-pump line.

We hold there is substantial evidence to support the Commission's findings that purchasers of petitioner's products are competitively engaged in the resale thereof; also that substantial evidence supports the Commission's find-

ing that petitioner's discriminatory prices have an adverse competitive effect such as is proscribed by the statute. Of course, all the statute requires is that the practices complained of may substantially lessen competition. See *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 46 and *Corn Products Refining Co., et al.* v. *Federal Trade Commission*, 324 U.S. 726, 738. We are also of the view that the Commission's order properly responds to the findings and conclusions of the Commission.

A more detailed discussion of our reasons for holding as hereinbefore indicated would seem to be unnecessary in view of our decisions in recent cases where practically the same issues were raised. These cases are *E. Edelmann & Company* v. *Federal Trade Commission*, 239 F. 2d 152; *Whitaker Cable Corporation* v. *Federal Trade Commission*, 239 F. 2d 253, and *C. E. Niehoff & Co.* v. *Federal Trade Commission*, decided January 9, 1957, our No. 11526.

On oral argument petitioner's counsel requested that we adopt here the same procedure as we did in the *Niehoff* case, that is, postpone the effective date of the Commission's order until some indefinite time in the future.

In *Niehoff* there was evidence in the record that C. E. Niehoff & Co. would be forced out of business if the traditional pricing practices which it then followed would be denied to it, while its competitors were left free to continue such practices. No such proof or argument was made in the case at bar. The suggestion made at the time of oral argument comes too late.

The order of the Commission is

AFFIRMED.

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit

Chicago 10, Illinois
Tuesday, April 30, 1957

Before

Hon. F. Ryan Duffy, Chief Judge
Hon. Philip J. Finnegan, Circuit Judge
Hon. H. Nathan Swaim, Circuit Judge

P. & D. Manufacturing Co., Inc., Petitioner, vs. Federal Trade Commission, Respondent.	Petition for Review of a Final order of the Federal Trade Commission.
No. 11798	

This order came on to be heard on petition for review of an order of the Federal Trade Commission and on the transcript of the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the order of the Federal Trade Commission entered in this cause on April 26, 1956, be, and the same is hereby, Affirmed.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois

Friday, August 2, 1957

Before

HON. F. RYAN DUFFY, *Chief Judge*
HON. PHILIP J. FINNEGAN, *Circuit Judge*
HON. H. NATHAN SWAIM, *Circuit Judge*

P. AND D. MANUFACTURING CO., INC., *Petitioner*,
vs.
FEDERAL TRADE COMMISSION, *Respondent*.
No. 11798
Petition for Review of an order of the Federal Trade Commission.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

P. & D. MANUFACTURING CO., INC., *Petitioner*,
v.
FEDERAL TRADE COMMISSION, *Respondent*.
No. 11798

FINAL DECREE AFFIRMING ORDER TO CEASE AND DESIST

(Filed Aug 28 1957)

P. & D. Manufacturing Co., Inc., petitioner herein, having filed in the Court on June 28, 1956, its petition to review and set aside an order to cease and desist issued on April 26, 1956, by the Federal Trade Commission, respondent herein, in a proceeding before said Commission entitled "In the Matter of P. & D. Manufacturing Co., Inc., F.T.C. Docket No. 5913;" and the cause having been heard by the Court on briefs and oral argument; and the Court

having rendered its decision on April 30, 1957, and having denied said petition to review; and thereafter on August 2, 1957, having denied a petition for rehearing:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid petition to review be, and the same is hereby dismissed, and that the said order to cease and desist be, and it hereby is, affirmed.

AND IT IS HERE FURTHER ORDERED, ADJUDGED AND DECREED that within ninety (90) days after entry of this decree petitioner file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which it has complied with said order to cease and desist.

By the Court:

/s/ F. RYAN DUFFY
/s/ PHILIP J. FINNEGAN
United States Circuit Judges.

Dated: Aug. 28, 1957

A True Copy:

Teste:

/s/ KENNETH J. CARRICK,
Clerk of the United States Court of
Appeals for the Seventh Circuit

(Seal)

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit

Chicago 10, Illinois
Wednesday, August 28, 1957

Before

Hon. F. Ryan Duffy, *Chief Judge*
Hon. Philip J. Finnegan, *Circuit Judge*

P. & D. Manufacturing Co., Inc., *Petitioner,* vs. Federal Trade Commission, *Respondent.*	Petition for Review of an Order of the Federal Trade Commission.

No. 11798

It is ordered by the Court that the enforcement of the decree entered by this Court on August 28, 1957 be stayed for a period of thirty (30) days in accordance with the provisions of Rule 28 (b) of the Rules of this Court.

A True Copy:

Teste:

/s/ Kenneth J. Carrick
Clerk of the United States Court of
Appeals for the Seventh Circuit

(Seal)

Robinson-Patman Amendment, Clayton Act, U. S. C., 9 Stat. 1526, Title 15—

SECTION 13. DISCRIMINATION IN PRICE, SERVICES, OR FACILITIES—PRICE; SELECTION OF CUSTOMERS

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them; PROVIDED, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: PROVIDED HOWEVER, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established AND PROVIDED FURTHER, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona

fide transactions and not in restraint of trade: AND PROVIDED FURTHER, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

BURDEN OF REBUTTING PRIMA FACIE CASE OF DISCRIMINATION

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: PROVIDED, HOWEVER, That nothing contained in sections 12, 13, 14-21, and 22-37 of this title shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) • • •
(d) • • •
(e) • • •
(f) • • •

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 11526 SEPTEMBER TERM, 1956, SEPTEMBER SESSION, 1956

C. E. NIEHOFF & Co., a corporation, *Petitioner*,
v.
FEDERAL TRADE COMMISSION, *Respondent*.

Petition to Review an Order of the Federal Trade Commission.

January 9, 1957

Before MAJOR, FINNEGAN and SCHNACKENBERG, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. Petitioner, sometimes referred to herein as Niehoff, asks us to review an order to cease and desist issued by the respondent, sometimes referred to herein as the commission, upon a complaint charging violation of section 2(a) of the amended Clayton Act.

The complaint charges that Niehoff, in its nationwide sale of automotive ignition and hydraulic brake parts to automotive jobbers competitively engaged in the resale of such products, discriminates in price between its small quantity purchasers and its large quantity purchasers, and that the effect thereof may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which Niehoff and its favored purchasers are engaged, or to injure, destroy or prevent competition with Niehoff, said favored purchasers or with customers of either of them.

Niehoff's amended answer admits that it is engaged at Chicago, Illinois, in the manufacture, sale and dis-

tribution in interstate commerce of automotive products and supplies to different purchasers and that it is in active and substantial competition with other companies similarly engaged in manufacturing and selling automotive products and supplies; admits that Niehoff sells its products to different purchasers at different price differentials, but alleges that such differentials are openly available to all of its purchasers and are not discriminatory, and denies that the effect thereof may be substantially to lessen competition and create a monopoly in its line of commerce; alleges that such price differentials make only due allowance for differences in the cost of sale or delivery resulting from the differing methods of quantities in which such products and supplies are sold or delivered to its purchasers; and also alleges that such price differentials as were granted by Niehoff were granted in good faith to meet equally low prices of its competitors.

Following extensive hearings before an examiner, he entered findings of fact. He concluded "that petitioner sold its products of like grade and quality to customers at different prices, that the customers competed with one another in the resale of these products, and that the different prices were discriminatory, and in violation of section 2(a) • • •"; that "• • • the differentials in price were not justified by differences in cost under the cost proviso of section 2(a)" (except in a minor particular which the commission on review set aside); and that "• • • the discriminations were not justified under the 'good faith proviso of section 2(b) of the Act." Accordingly the examiner entered a provisional order to cease and desist. Upon cross appeals to the commission by both parties, the commission, on May 17, 1955, affirmed the findings and order of the examiner with slight modification and entered the order now under review. Summarized, the basic facts, which are not in real dispute, are now stated.

Niehoff sells and distributes in commerce certain automotive products and supplies. There are many different

items classified into three lines: an ignition line, a hydraulic line, and a testing equipment line.

Niehoff's total sales volume in the sample year 1949 was $2,068,499, and of this amount approximately 90% represented sales in the ignition line, 3 to 6% in the hydraulic line, 2% in the testing equipment line, and 2% in rebuilt items.

Its domestic sales were made to some 866 jobber accounts. The prices paid by these customers were based in the first instance on Niehoff's jobber price list which is the base price schedule. Niehoff grants discounts from this schedule which vary the net prices actually paid by its several jobber accounts. For discount purposes Niehoff classified its jobber customers at the beginning of each year on the basis of the purchases made during the preceding year. A 2% discount for prompt payment is accorded to all accounts regardless of classification. Niehoff grants uniform freight allowances to all jobber customers and treats all accounts uniformly in the handling of merchandise returned for credit. As found by the examiner, the various accounts are placed in one of four classifications:[1a]

1. Jobbers whose annual purchases are less than $1,200 are classified as "jobbers without agreement"[2] and who pay the regular jobber list price.

2. Jobbers whose annual purchases range from $1,200 to $3,600 receive Niehoff's "jobbers agreement" and as such receive the following discount and allowances from the base jobber price:

[1a] The classifications referred to are somewhat confusing, there appearing to be overlapping of the classes. This circumstance is in our view of the case immaterial.

[2] In 1950 the designations used to describe the accounts in each classification were changed but the basis of classification and the buying prices remained the same for each class.

Annual volume of purchases	Discount allowance, percent
$1,200-$2,400	5
$2,400-$3,600	7
$3,600 and over	10

3. Jobbers whose annual purchases range from $3,600 to $6,000 are classified as "distributors without agreement" and receive a 10% discount off Niehoff's base jobber price on all purchases.

4. Jobbers whose annual purchases are in excess of $6,000 are classified as "distributors with agreement" and as such receive 10% discount off Niehoff's base prices on all purchases and the following additional discount allowances in the form of merchandise credits:[3]

Annual volume of purchases	Discount allowance, percent
$6,000-$8,400	5
$8,400-$12,000	6
$12,000 and over	7[4]

The commission found, and it is not disputed, that this system of pricing provided different net purchase prices. It also found, and the record shows, that Niehoff sold to more than one account in a single city or trading area and that the net prices paid by accounts within given trading areas varied. It was further found that accounts within trading areas competed with one another in selling Niehoff's products.

[3] The additional discount allowances do not apply to purchases of service stocks, equipment and brake fluid.

[4] In 1949, 299 accounts were in class 1 and purchased at jobber list less cash discount. 228 were in class 2; 241 accounts were in class 3 and 98 accounts in class 4. There was a deviation from the stated price plan in that Niehoff sold to one buying group known as Cotton States, Inc., which in 1949 was composed of nine jobbers. Niehoff treats this group as a single purchaser, selling on its class 4 basis. The jobber member pays the invoice to group headquarters and it in turn remits monthly for all purchases by its members during that month. Except for one monthly billing instead of 9, the operation saves Niehoff nothing. In 1949 the annual purchases of only one member would individually have justified the discount given.

The commission found that Niehoff's price differentials constituted discriminations in price. It was further found that the effect of these discriminations may be to substantially lessen, injure, destroy or prevent competition in the resale of Niehoff's products. This finding took into account the size of the differentials, amounting to as much as 16% in net purchase price; the fact that the record shows that the automotive parts business is highly competitive; that jobbers stock many lines ranging from 15 or 20 for the small operator to more than 100 for the large operator and these lines generally consist of thousands of items; that net profit depends on the accumulation of small margins on the numerous items handled; and that the record also shows that the margin of profit generally runs about 4% of sales.

The commission also found that Niehoff's discounts to favored distributors contribute a direct and powerful advantage to the recipient and concluded that there was a reasonable probability that Niehoff's pricing practices substantially lessened competition at the secondary level and that the effect of discriminations may be to injure, destroy or prevent competition between purchasers receiving the benefit of the discriminations and those to whom they were not accorded.

Niehoff introduced evidence for the purpose of justifying its price differentials by differences in costs of sale and delivery. This evidence pertained to sales expenses, advertising expense, and costs of processing orders. Upon consideration of all this evidence the commission rejected Niehoff's claim that its differentials were cost-justified within the meaning of the proviso of section 2(a).

Niehoff also introduced evidence to prove that its price differentials were made in good faith to meet the equally low price of a competitor or competitors within the mean-

ing of the good faith proviso of section 2(b) of the Act.[6] The commission found that Niehoff did not establish any price or prices as a response to a particular competitor, and that, once the base price structure was established with reference to general competitive conditions, Niehoff did not deviate to meet the prices of particular competitors. It also found that the net prices accorded by Niehoff were a reflection of its nation-wide pricing system formulated to meet competition generally and not designed to meet any particular competitor's prices. On the basis of this finding the commission rejected the claim that Niehoff's price discriminations were justified under the good faith proviso of section 2(b).

I. With the exception of certain phases of this case with which we shall hereinafter deal specially, our holding in this case is controlled by our decisions in *Whitaker Cable Corporation* v. *Federal Trade Commission*[7] and *E. Edelmann & Co.* v. *Federal Trade Commission*.[7] We adhere to the views expressed in those cases.

I. We have made a thorough search of the record and considered the evidence introduced by both parties on the issues involving cost justification and the alleged good faith of Niehoff in meeting equally low prices of its competitors. While there may be some conflict in the evidence upon these issues, we find that there is substantial evidence to support the findings of the commission.[8] Substantial evidence means such relevant evidence as a

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[6] "Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." 15 U.S.C.A. § 13(b).

[7] No. 11494 (C.C.A. 7) decided 12-14-56.

[7] No. 11500 (C.C.A. 7) decided 12-14-56.

[8] 5 U.S.C.A. § 1009 (e) (5); *Universal Camera Corporation* v. *N. L. R. B.*, 340 U.S. 474, 488.

reasonable mind might accept as adequate to support a conclusion. *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U.S. 197, 229.

It is not the law that we may displace the commission's choice between two fairly conflicting views, even though we would justifiably have made a different choice had the matter been before us *de novo*. *Universal Camera Corp.* v. *N. L. R. B., supr*, 488.

For the reasons herein set forth, the commission's order to cease and desist will be affirmed, subject to a modification to which we now refer.

III. At this point we consider Niehoff's prediction that it "would be forced out of business if the traditional pricing practices which it now follows were denied to it while its competitors are free to continue such practices." There is uncontradicted evidence in the record to factually support this prediction.

The record shows that, as to the automotive ignition line which constitutes at least 90% of Niehoff's business,* it has 19 competitors, and included in this group are 3 competitors who presently have complaints or orders to cease and desist pending against them before the commission, the other 16 competitors being free to continue their present pricing practices unless and until cease and desist orders are entered against them in proceedings not yet commenced.

It thus appears that the order against Niehoff was entered at a time when the commission had acted against only a few of this firm's competitors. We are persuaded by Niehoff's argument that, in view of the lapse of time which is inevitably involved in proceedings before the commission, Niehoff's business will suffer economic extinction before the commission adjudicates upon trade practices of Niehoff's competitors, which in their purpose and effect are essentially similar to those condemned in the Niehoff order. This result will follow if Niehoff is re-

* Another 6% of Niehoff's business is in the hydraulic line where it has 10 principal competitors.

quired by elimination of its present selling methods to charge higher prices for its products than the prices charged by its competitors against whom the commission has not yet ruled.

The commission takes the position that it has no power to stay compliance with its order. It relies upon a part of section 11 of the amended Clayton Act,[10] contending that it has no discretion as to the enforcement of the law. It fails to cite that part of section 11 which provides that the commission "shall issue * * * an order requiring such person to cease and desist from such violations * * * *within the time fixed by said order.*" (Italics supplied for emphasis.) It is our opinion that this statutory language vests in the commission power to postpone the time at which an order is to take effect.

In any event, the commission in this case has not exercised this permissive power under section 11, and it argues that this court has no power to delay or postpone compliance with the commission's order. If this be true we are impotent to postpone the effective date of the order and, furthermore, under section 11 of the act we can be required to enforce the order in the manner therein provided without delay. In other words, according to the commission, we may witness and participate in, but not interfere with, the economic death of Niehoff while the commission machinery continues to operate toward cease and desist orders against Niehoff's competitors.

However, we do not admit judicial impotency in this situation. Section 11 of the Clayton Act[11] gives this court power, *inter alia*, to modify an order of the commission. This includes the power to change that part of an order stating when it shall take effect. We have held[12] that the power of a court of appeals to enforce, set aside or modify the commission's order is an exercise of original jurisdiction, rather than appellate jurisdiction, and that the court

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[10] 15 U.S.C.A. § 21.

[11] 15 U.S.C.A. § 21.

[12] *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 128 F. 2d 481, 484.

may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit. The order in this case was issued on May 17, 1955 and directed that Niehoff "forthwith" cease and desist. This order is in the nature of an injunction. We have a right to consider its effect upon Niehoff in the light of equitable principles, and to grant relief accordingly. We have no way of knowing in advance what further proceedings, if any, will be had by the commission against Niehoff's competitors to whom we have heretofore referred. The fixing of the time at which the order against Niehoff shall become effective is a matter over which we now reserve jurisdiction, the exercise of which will depend upon the future course of the commission's proceedings against Niehoff's competitors. For that reason the order against Niehoff is hereby modified by striking the word "forthwith" therefrom and by adding to said order the following: "This cease and desist order shall take effect at such time in the future as the United States Court of Appeals for the Seventh Circuit may direct, *sua sponte* or upon motion of the Federal Trade Commission." As thus modified, the order is affirmed.

Order, As Modified, Affirmed.

FINNEGAN, *Circuit Judge*. Dissenting. Affirming this order of the Commission and then directing its indeterminate suspension, causes me to diverge from the majority view. Section 11 of the Clayton Act, as amended, mandates that: "The findings of the Commission • • • as to the facts, if supported by substantial evidence, shall be conclusive," 64 Stat. 1127, 15 U. S. C. § 21(1952). If, as my brothers find, this order squares with the statutory yardstick then a violation of the Clayton Act has been established. But, on the other hand if the order, approved by the majority, requires modification for the reasons they state, then it would seem the Commission's order is defective since it is unsupported by evidence

concerning petitioner's competitors. After all the matter involves an economic problem within a defined industry. In its opinion (T. R. 1027-1028) the Commission stated, inter alia: "The initial decision in effect held that the status of the price of respondent's competitors as lawful or unlawful was not controlling to decision here . . . The lawfulness or unlawfulness of its competitors' prices . . . are not in issue inasmuch as respondent's defense has been legally insufficient on other grounds."

We reach much too far into the administrative agency's province by reserving our jurisdiction contingent upon "the future course of the Commission's proceedings against Niehoff's competitors." Either such matters are now before us and we have failed to properly evaluate them in reviewing evidence of price discrimination, or, they are not, now, and in that state of affairs we have no business with them. Just when this Court will decide to infuse vitality into the Niehoff order, currently in suspended animation, escapes me entirely. It appears that the majority's modification compels the Commission to investigate, or complete examination of, Niehoff's competitors at the risk of forfeiting an otherwise approved order. Whether this entails all 19 competitors or a baker's dozen is unrevealed. My grave doubts that our statutory power to *modify* Federal Trade Commission orders can be converted into policing and supervising, though perhaps obliquely, the length, breadth and sequence of Commission investigations brings me to the position I now take. Certainly we would refuse to activate the Commission upon a bare petition for mandamus to investigate the automotive ignition industry. Responsibility of achieving enforcement of the statutes Congress assigned to the Commission lies elsewhere.